



FEDERALISM AND GOVERNANCE IN CANADA LAW 525

READINGS

VOLUME II

Professor Richard Simeon

**Faculty of Law
University of Toronto**

Winter 2006

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FACULTY OF LAW
UNIVERSITY OF TORONTO

LAW 525 HS

JPJ 2121HS

Federalism and Governance in Canada

Winter 2006

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Objectives of the Course

Federalism, along with parliamentary government and the Charter of Rights and Freedoms, is one of the three fundamental pillars of governance in Canada. Virtually every issue that confronts Canadian citizens and their governments bumps up against federalism and intergovernmental relations at some point. This course aims to explore the law and politics of federalism and intergovernmental relations in Canada, from three vantage points: What are the implications of federalism and its practice in Canada for governance and for policy outcomes; for the accommodation and management of regional, linguistic and ethnic difference; and for democratic politics – transparency, responsiveness and accountability? In each of these areas, we will observe a ‘deficit.’ So, in addition to analysing the current dynamics of federalism, we will also explore options for reform. Thus we will focus strongly on some of the major current issues facing the federation, and rely on a number of related policy documents from governments and other actors.

The major assignment for the course is a research essay in which students will explore the law and politics of federalism as they affect policy outcomes in a chosen area of public policy.

Course Format

This is a seminar course. In the first weeks, we will concentrate on class discussion of some central themes and issues in the study of federalism in Canada, based on common readings, and on introductory presentations by the instructor. In the final weeks of the course, following opening discussion of the main issues, students will present the results of their own work on how federalism and intergovernmental relations play out in a variety of policy areas. Students should begin thinking about the policy areas they wish to investigate as early as possible in the term. A short statement describing the proposed paper is due before the start of Reading Week.

Course requirements and grading

1. Class participation: 25 per cent.
2. Final paper. 20 – 25 pages. Due last day of class. 75 per cent.

Materials:

Almost all reading materials for the course will be available in a reader in the Law School bookstore; a few are found on the internet. Students are also asked to purchase two books: *Canadian Federalism: Performance, Effectiveness and Legitimacy*, Eds. Herman Bakvis and Grace Skogstad, Don Mills: Oxford University Press, 2002; and *Reconsidering the Institutions of Executive Federalism*, Eds. J. Peter Meekison, et. al. Montreal and Kingston: McGill-Queen's University Press. They are also in the bookstore.

You will note that a large number of readings have been assigned on each topic. This designed to illustrate the range of materials available. Read selectively and according to your own interests in the other listed materials. And be prepared to contribute insights from your own reading each week.

COURSE OUTLINE

PART ONE

Week One: (January 4) Introduction

- Introduction: course objectives
- Course requirements
- Three perspectives or lenses: Federalism and democracy, federalism and good governance; federalism and the management of conflict in a divided society
- Canadian federalism in comparative perspective
- A brief overview of the evolution of federalism in Canada

Reading: None required

Students may wish to consult the following:

- *Ian Robinson and Richard Simeon, "The Dynamics of Canadian Federalism," in James Bickerton and Alain-G. Gagnon, Eds., *Canadian Politics* (3rd ed.) Peterborough: Broadview Press, 1999. 239-262.
- *Ronald L. Watts, *Comparing Federal Systems* (2nd. Ed.) Kingston: Institute of Intergovernmental Relations, 1999. pp. 1-20, 120-123.
- Herman Bakvis and Grace Skogstad, 'Canadian Federalism: Performance, Effectiveness and Legitimacy,' in their book of the same title. Don Mills: Oxford University Press 2000. pp. 3-23.

Week Two: (January 11) The Social, Cultural and Economic Context

- Regionalism
- Quebec nationalism
- A changing national and global economic order
- Cross-cutting themes: class, gender, etc.

Reading:

- Donald V. Smiley, "The Compounded Crisis in Canadian Federalism," from *Canada in Question*. Pp. 171-188
- Thomas J. Courchene, "Broadening, Deepening and Re-territorializing Federalism," Paper presented at a conference, *Canada and Quebec in the New Century*, November, 2003.
- Read one of and be prepared to discuss:
 - David Cameron and Richard Simeon, 'Ontario in Confederation: The Not-So-Friendly Giant,' in Graham White, Ed., *The Government and Politics of Ontario*. 5th ed., Toronto: University of Toronto Press, 1997. pp. 158-185.
 - Daniel Salée, 'Quebec's Changing Political Culture and the Future of Federal-Provincial Relations in Canada,' in Hamish Telford and Harvey Lazar, Eds., *Canadian Political Cultures in Transition Canada : The State of the Federation, 2001*. Kingston and Montreal: McGill-Queen's University Press, 2002. pp.163-197.
 - Robert G. Finbow, 'Atlantic Canada in the New Right Era: The Necessity of Unity?' in David Taras and Beverly Rasporich, Eds. *A Passion for Identity*. Scarborough: Nelson Thompson learning, 2001. Pp. 311-330.
 - Canada West Foundation, *Building a Stronger Canada: Taking Action on Western Discontent*. Stephen Harper, et. al, 'The Alberta Agenda.' Letter to Ralph Klein. *Policy Options*, April 2001. Pp. 16-17.
- Will Kymlicka, "Multinational Federalism in Canada: Re-thinking the Partnership," *Policy Options* March, 1998. 5-8.
- Jane Jenson, "Distinct Societies, Citizenship Regimes and partnership." *Policy Options*, March 1998. Pp. 28-30.

Week Three: (January 18) The Institutional context

- Federalism and parliamentary government
- Federalism and the Charter
- Federalism and judicial review
- Federalism and the party system
- Regional representation at the center: The Senate

Be prepared to talk about the impact on federalism of one of these institutions.

Reading:

- R. v. S.S., [1990] 2 S.C.R. 254 (The Charter)
- Haig v. Canada (Chief Electoral Officer), [1993] 2 S.C.R. 995
- *A. Brian Tanguay, 'Political parties and Canadian Democracy: Making Federalism do the Heavy Lifting,' in Herman Bakvis and Grace Skogstad, Eds., *Canadian Federalism: Performance, Effectiveness, and Legitimacy*. Don Mills: Oxford University Press, 2002. pp. 296-316.
- *Gerald Baier, 'Judicial Review and Canadian Federalism,' in Bakvis and Skogstad. Pp. 24-39.
- C. E. S. Franks, "A Continuing Canadian Conundrum: The Role of parliament in Questions of National Unity and Processes of Amending the Constitution," in *Reconsidering the Institutions of Canadian Federalism*. Pp. 35-56.
- James B. Kelly, "Guarding the Constitution: Parliamentary and Judicial Roles Under the Charter," in *Reconsidering*, pp. 77-112.
- *Jack Stilborn, "Senate Reform Proposals in Comparative Perspective." Library of parliament, Parliamentary Research Branch. November, 1992.

- Tom Kent, "An Elected Senate: Key to Redressing the Democratic Deficit, Revitalizing Federalism," *Policy Options*, April 2004. Pp. 49-53.

PART TWO: THE DYNAMICS OF FEDERALISM AND INTERGOVERNMENTAL RELATIONS

Week Four: (January 25) Who does what? The division of powers

- Federal, provincial, and local responsibilities
- Criteria for the allocation of responsibilities
- Substantive powers: the economic union; the social union; the environmental union; trade; other
- Policy instruments: the powers to tax, spend, borrow, regulate
- Overlap, interdependence, and concurrency
- 'Disentanglement' or 'sharing?'
- 'Symmetry' or 'asymmetry?'
- A new division of powers for the 21st century?

Reading:

- *Constitution Act, 1867*. Ss. 91, 92.
- Richard Simeon, "The Division of Powers and Responsibilities in Canada: Draft Country Report." Paper presented to Forum of Federations and IACFS, Global Dialogue Series. Delhi, India, November 2003.
- Royal Society of Canada, "Who's Afraid of Asymmetrical Federalism?" n.d. (2005)
- A. Petter, 'Federalism and the Myth of the Federal Spending Power,' in *Can. Bar Rev.* 68: (1989).
- Thomas J. Courchene, *ACCESS: A Convention on the Canadian Economic and Social Systems*. Paper prepared for Ontario Ministry of Intergovernmental Affairs, 1996.

Be prepared to comment on one of:

- (Spending Power) *Reference re. Canada Assistance Plan, [1991] 2 S.C.R. 525. Winterhaven Stables Ltd. v. Canada (Attorney-General)*
- (Peace, Order and Good Government) *Crown Zellerbach Canada Ltd.*, 49 D.L.R. (4th) 161.
- (Property and Civil Rights) *Central Canada Potash v. Government of Saskatchewan*, [1979] 1 S.C.R. 42. *Global Securities Corp. v. British Columbia (Securities Commission)* 2000 SCC 21.
- (Paramountcy) *Rothmans, Benson and hedges, Inc. v. Saskatchewan*, [2005] 1 S.C.R. 188, 2005 SCC 13.
- (International). R. Howse, "'The Labour Conventions Doctrine in an Era of Interdependence,' *Ca. Bus. Law J.* 16: (1990). Pp. 163-178.
- (Subsidiarity and local powers) *114957 Canada Ltée (Spraytech, Société d'aérosage) v. Hudson (Town)* [2001] 2 S.C.R. 241.

Week Five: (February 1) Intergovernmental Relations

- Collaborative vs. competitive IGR
- The institutions of IGR
- The political dynamics of IGR
- Intergovernmental Agreements and Accords
- Dispute resolution

- IGR and the citizen: Fixing the 'democratic deficit.'
- Innovation: A new Council of the Federation
- Crisis Management – the case of SARS

Reading:

- S. Choudhry, 'Bill 11, the *Canada Health Act*, and the Social Union: The Need for Institutions,' *Osgoode hall L. J.* 38: (2000). P. 39-76.
- Stefan Dupré, 'Reflections on the Workability of Executive Federalism.' In Richard Simeon (Coordinator), *Intergovernmental Relations*, Toronto: University of Toronto Press, 1985. Pp. 1-32.
- Albert Breton, 'Supplementary Statement,' in Royal Commission on the Economic Union and Canada's development Prospects, *Report*. Vol. 3.
- Council of the Federation, *Founding Agreement*. Ottawa: Canadian Intergovernmental Conference Secretariat. 2003.
- Commentaries on the Council, Institute of Intergovernmental Relations and Institute for Research on Public Policy, October 2003. Lazar, Burelle, Gibbins, Noel, Abele and Prince. Read one.
- In Meekison, et, al, *Reconsidering the Institutions of Canadian Federalism: Introduction*, one of Chapters 5, 6, 7, and Ch. 15.
- Alain Noel, 'Power and Purpose in Intergovernmental Relations,' *Policy Matters* 2: 6. Montreal: Institute for Research on Public Policy, 2001
- Richard Simeon and David Cameron, 'Intergovernmental Relations and Democratic Citizenship: An Oxymoron if ever there was one?' in Bakvis and Skogstad, op. cit.
- National Advisory committee on SARS and public health, *Learning from SARS: Renewal of Public Health in Canada*. October, 2003. Excerpt.

Intergovernmental Agreements. Be prepared to comment on one of:

- Social Union Framework Agreement, 1999.
- First Minister' Accord on Health Care, 2003
- Canada-Quebec Agreement on Early Learning and Child Care, October 28, 2005.
- Canada-Ontario Immigration Agreement, 2005; Canada-Ontario Early learning Funding Agreement;
- Canada-Ontario Labour market Agreements.

Week Six: (February 8) Fiscal Federalism: Money and Power

Visiting expert panel.

- Matching revenues and responsibilities
- Vertical and horizontal equity
- The power to tax and spend
- Intergovernmental transfers: the spending power
- Equalization
- Is there a fiscal 'imbalance?'

Reading:

- Sujit Choudhry, Jean-Francois Gaudreault-Desbiens, and Lorne Sossin, eds., "Introduction: Exploring the Dilemmas of Solidarity," to appear in *Dilemmas of Solidarity: Rethinking Redistribution in the Canadian Federation*, Toronto: University of Toronto Press, 2006.

- Centre for the Study of Living Standards, "Fixing Fiscal Federalism to Improve Canada's productivity." 4 November 2005
- Tom Kent, "Reimbursement Federalism: Democratizing Cooperative Federalism for the 21st Century," *Options* October 2005. pp. 51-57.

Be prepared to discuss one of the Ontario, federal, Alberta or Quebec positions on fiscal imbalance.

- Hon. Greg Sobara. Ontario Minister of Finance. Presentation to House of Commons, Sub-committee on fiscal imbalance, March 11, 2005.
- Thomas J. Courchene, "Energy Prices, Equalization and Federalism," *Policy Options* October 2005. pp. 40-45.
- Todd Hirsch, "Beyond Alberta's Prosperity Dividend: A Western Accord to Pool Resource Wealth," *Policy Options*, October 2005. pp. 47-50.
- Quebec. Commission on Fiscal Imbalance. *A New Division of Canada's Financial Resources: Report*. 2002. Summary and Recommendations.
- Canada. Department of Finance. *The Fiscal Balance in Canada: The Facts*. July 2002.
- Thomas Courchene, "Hourglass Federalism – How the Feds got the provinces to run out of money in a decade of liberal budgets." *Policy Options* April 2004, pp. 12-16.

PART THREE: CURRENT ISSUES IN CANADIAN FEDERALISM

Note to students: In these weeks, we will focus the discussion around your own research on each of these sets of issues.

Week Seven: (February 15) Federalism and Social Policy

- 'National Values' versus Provincial variations: social citizenship in the federation
- The politics of the Social Union Framework Agreement (SUFA)
- Federalism and health care
- Federalism and child care, disability and other social issues

Reading:

- Richard Simeon, "Social Justice: Does Federalism make a Difference?" To appear in Sujit Choudhry, Jean-Francois Gaudreault-Desbiens and Lorne Sossin, eds., *Dilemmas of Solidarity: Rethinking Redistribution in the Canadian Federation*, Toronto: University of Toronto Press, 2006.
- Keith Banting and Stan Corbett, 'Health Policy and Federalism: An Introduction,' in Banting and Corbett, *Health Policy and Federalism: A Comparative Perspective on Multi-level Governance*. Kingston: Institute of Intergovernmental Relations, and McGill-Queen's University Press, 2001. Pp. 1-35.
- Keith Banting, "The Past Speaks to the Future: lessons from the Postwar Social Union," in H. Lazar, ed., *Non-Constitutional Renewal*. Kingston: Institute of Intergovernmental Relations, 1998. pp.39-48 and 50-61.

Law students, read:

- Sujit Choudhry, "Recasting Social Canada: A Reconsideration of Federal Jurisdiction over Social Policy." (2002) 52, *University of Toronto Law Journal*, 163-252.

Political science students, read:

- ONE of Antonia Maioni, 'Health Care in the New Millennium,' or Linda White, 'The Child Care Agenda and the Social Union,' in Bakvis and Skogstad.
- 'Health Care, Citizenship and Federalism.' Chapter Two, Commission on Health Care in Canada (Romanow Commission), *Building on Values: The Future of Health Care in Canada*.
- Tom Kent, "In the National Interest": A Social Policy Agenda for a New Century – Restore Cooperative Federalism, Modernize Medicare, Put Children First." *Policy Options*, August 2004. Pp. 24-29.
- CICS, *A Ten Year Plan to Strengthen Health Care*. Federal-Provincial Health Accord, September 2004.
- Quebec, *Asymmetrical Federalism that Respects Quebec's Jurisdiction*. 15 September 2004.

Week Eight: (February 22) Reading Week: No class

Week Nine: (March 1) Federalism and the Environment

- Jurisdiction and values
- Intergovernmental harmonization accords.
- Negotiating Kyoto

Reading:

- *Mark S. Winfield, 'Environmental Policy and Federalism,' in Bakvis and Skogstad. Pp. 124-137.
- Kathryn Harrison, "Federalism and Kyoto: Remarks," presentation to conference 'Looking backward, Thinking Forward,' Institute of Intergovernmental Relations, Queen's University, May 2005.
- Canadian Council of Ministers of the Environment, *A Canada-Wide Accord on Environmental Harmonization*.
- *Patrick Fafard, "Environmental Harmonization: A Guide to the Future of Canadian Federalism?" *Canada Watch* 6: January 1998.
- Kathryn Harrison, "The Canada-Wide Accord: A Threat to National Standards," *Canada Watch* 6: (January 1998)
- *Jack Stilborn, "Canadian Intergovernmental Relations and the Kyoto Protocol: What happened, What Didn't?" Paper presented to the Canadian Political Science Association, May 2003.
- *Friends of the Oldman River Society v. Canada* [1992] 1 S.C.R. 3. *Canada Gazette*. Order Adding Toxic Substances to Schedule 1 of the Canadian Environmental protection Act, 1999. (Kyoto) September 3, 2005.
- *Hydro Quebec vs. Quebec* 1997 3 S.C.R. 213

Week Ten: (March 8) Federalism and the Economy

- Do globalization, the knowledge economy and the productivity agenda require us to re-think federalism?
- The 'economic union' debate and the AIT.

- Ottawa, the provinces and international trade

Reading:

- Kenneth Norrie, Richard Simeon and Mark Krasnick, 'Canada as an Economic Union,' Chapter 20 in *Federalism and the Economic Union in Canada*. Vol. 59 Research Studies of the Royal Commission on the Economic Union. Toronto: University of Toronto Press. Pp. 293-326.
- Sujit Choudhry, "Strengthening the Economic Union: The Charter and the Agreement on Internal Trade." 2002 12 *Constitutional Forum*. 112-119..
- Douglas Brown, *Market Rules: Economic Union Reform and Intergovernmental Policy-Making in Australia and Canada*. Montreal and Kingston: McGill-Queen's University Press, 2002. Ch. 9: Conclusions. Pp. 267-237.
- *ONE of:
 - Mark R. Macdonald, 'The Agreement on Internal Trade: Trade-offs for Economic Union and Federalism,' (pp. 124-137);
 - Grace Skogstad, 'International Trade Policy and Canadian Federalism: A Constructive Tension?' (pp. 158-177);
 - or Herman Bakvis, 'Checkerboard Federalism? Labour Market Development Policy in Canada,' (pp. 197-229) in Bakvis and Skogstad, *Canadian Federalism*. Ian Roberge, "Fighting the Joint Decision Trap: Canadian Regulation in the Securities Industry." Unpublished paper
- David Schneiderman, 'Economic Citizenship and Deliberative Democracy: An Inquiry into Constitutional Limitations on Economic Regulation.' *Queen's Law Journal* 21: (1993). 125.
- M. J. Trebilcock and R. Behboodi, 'The Canadian Agreement on Internal Trade: Retrospect and Prospects,' in Trebilcock and Daniel Schwanen, Eds., *Getting There: An Assessment of the Agreement in Internal Trade*. P. 20.

Week Eleven: (March 15) Broadening the scope of Multilevel Governance/1 Cities in the federal system

Visiting expert panel

Reading:

- Joint Ontario – City of Toronto Task Force, Final Staff Report, *Building a 21st Century City*
- Governing Toronto Advisory panel, *The City We Want – The Government We Need*. Report of the Governing Toronto Advisory Panel, November 2005.
- Andrew Sancton, 'Municipalities, Cities and Globalization: Implications for Canadian Federalism,' in Bakvis and Skogstad, *Canadian Federalism*. Pp.261-277.
- Provincial and Territorial Meeting of Ministers Responsible for Local Government, September 16-17, 2004. *Principles Underlying Federal Government Initiatives Regarding Municipalities*.
- Background:
 - Thomas J. Courchene, "Responding to the NAFTA Challenge: Ontario as a North American Region State and Toronto as a Global City Region." Paper prepared for Global City-Regions Conference, UCLA School of Public Policy and Social Research, October, 1999.
 - City Solicitor, City of Toronto. *Powers of Canadian Cities: The Legal Framework*. 2000, Updated October 2001.

Week Twelve: (March 22) Broadening the Scope of Multilevel Governance/2. Bringing in the First Nations.

Reading:

- First Ministers and Aboriginal leaders, *Strengthening Relationships and Closing the Gap*. Kelowna, B.C., November 24-25, 2005.
- Assembly of First Nations, response to Kelowna agreement.
- *Frances Abele and Michael J. Prince, 'Alternative Futures: Aboriginal peoples and Canadian Federalism,' in Bakvis and Skogstad, *Canadian Federalism*. Pp. 220-237.
- Joseph Gosnell, 'The Nisga'a Treaty and the Diversity of Canadian Federalism.' *Documents*, Forum of Federations.
- *Patrick Macklem, *Indigenous Difference and the Constitution of Canada*. Toronto: University of Toronto Press, 2001. Ch. 9., Pp. 265-285.

Week Thirteen: (March 29): : Federalism and National Unity

- From the Victoria Charter to the Charlottetown Accord: the failure to 'constitute ourselves as a sovereign people.'
- The Quebec referendum of 1995 and after: The Secession Reference, the Clarity Act and Quebec's response
- The continuing agenda: Non-constitutional Renewal?
- The next referendum looms

Reading:

- Peter Russell, *Constitutional Odyssey: Can Canadians Become a Sovereign People?* Toronto: University of Toronto Press, 3rd ed, 2004. Ch. 12. pp. 228-272.
- A. Cairns, 'Citizens (Outsiders) and Governments (Insiders) in Constitution-Making: the Case of Meech Lake,' *Canadian Public Policy* 4: (1988) S121.
- *Reference re Secession of Quebec*. [1998] 2 S.C.R. 217.
- Government of Canada. Bill C. 26 2000. *An Act to give effect to the requirement for clarity* . . .
- Government of Québec *Bill* 99. 2000. *An Act respecting the exercise of the fundamental rights and prerogatives of the Québec people and the Québec State*. <http://publicationsduquebec.gouv.qc.ca/documents/gazette/prive/bill/99A0103.pdf>.
- *Patrick J. Monahan, *Doing the Rules: An Assessment of the Federal Clarity Act in Light of the Quebec Secession Reference*. Toronto: C. D. Howe Institute, 2000.
- Claude Ryan, *Consequences of the Quebec Secession Reference: The Clarity Bill and Beyond*. Toronto: C. D. Howe Institute 2000.

Week Fourteen: (April 5): Conclusion

- Concluding discussion. How well does our federalism serve the values of:
- Democracy: fixing the 'democratic deficit.'
- Effective governance: fixing the 'joint decision trap'
- Managing and accommodating diversity
- An agenda for continuing reform?

Reading:

Fred Cutler and Matthew Mendelsohn, 'What Kind of Federalism do Canadians (Outside Quebec) Want?' *Policy Options*, October, 2001. Pp. 23-29.

Jennifer Smith, *Federalism*. A volume in the Canadian democratic Audit series. Vancouver: UBC Press, 2004. Ch. 7. pp. 130-160.

Thomas J. Courchene, "Pan-Canadian Provincialism – the New Federalism and the Old Constitution." *Policy Options*, November 2004. 20-28

